Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE A. ZIMMERMAN and RICHARD ZIMMERMAN,
Petitioners,

v.

WILLIAM T. MANLEY, Acting Administrator, Agricultural Marketing Service, U.S. Dept. of Agriculture, and JOHN BLOCK, Secretary of Agriculture, U.S. Department of Agriculture

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUPPLEMENTAL APPENDIX
TABLE OF CONTENTS

Page

Decision of Dept. of Agriculture
In Re: Clyde Zimmerman SA-1

Decision of Dept. of Agriculture
In Re: Richard Zimmerman SA-13

Order Denying Petition for Review
In Re: Clyde Zimmerman SA-23

Order Denying Petition for Review
In Re: Richard Zimmerman SA-24

Eighth Circuit Denial of Rehearing Petition SA-25

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

DECISION

PACA RC 82-1030

IN RE: CLYDE A. ZIMMERMAN,
Petitioner

PRELIMINARY STATEMENT

This is a proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) and the applicable Rules of Practice (7 C.F.R.), Section 47.1; 47.2(a) through (h); 47.46; and 47.47 *et seq.*, which pertain to the administrative determination of whether a person is or was "responsibly connected" with a licensee under the Act. This proceeding is held to determine if the Petitioner was "responsibly connected" with Yankee Brokerage, Inc., a Missouri corporation, and a licensee under the Act at the time Yankee Brokerage, Inc. purchased 363 lots of perishable agricultural commodities from 61 sellers, in interstate commerce, and failed to make full payment promptly of the agreed purchase prices.

A disciplinary proceeding was instituted under the Perishable Agricultural Commodities Act by a complaint filed on October 8, 1982, against Yankee Brokerage, Inc. in PACA Docket No. 2-6130. It was alleged that Yankee Brokerage, Inc., during the period of May 1981 through November 1981, purchased 363 lots of perishable agricultural commodities from 61 sellers in interstate commerce and failed to make full payment promptly of the agreed purchase prices in the total amount of $975,833.21.

On December 30, 1982, Administrative Law Judge William J. Weber issued a decision and order, effective February 9, 1983, finding that respondent had committed willful, flagrant, and repeated violations of Section 2 of the Act.

A hearing was held in PACA RC 82-1030, on August 25, 1983, in Kansas City, Missouri, to determine whether Clyde A. Zimmerman was an individual "responsibly connected" with Yankee Brokerage, Inc. during the period of May 1981 through November 1981. Clyde A. Zimmerman was represented by Mr. William E. Shull, Kearney, Missouri. Mr. Edward M. Silverstein, Office of the General Counsel, represented the Agency. The hearing was held before Harry L. Williams who had been designated the Presiding Officer. The Petitioner and the Agency elected to file briefs.

FINDINGS OF FACT

1. Yankee Brokerage, Inc., a Missouri corporation, had as its business address Post Office Box 12458, North Kansas City, Missouri.

2. Petitioner became a salesman for Yankee Brokerage, Inc., "Somewhere around 1972-73." As a salesman, he would contact suppliers of produce for the purpose of brokering that produce to firms in the Kansas City, Missouri area. He sold some 50 loads of produce each month.

3. The PACA License Renewal Application bearing a date of August 14, 1974, shows that Clyde A. Zimmerman was made Treasurer and a Director of Yankee Brokerage, Inc. on August 1, 1974. (Ex. A-3)

4. The License Renewal Application, bearing a receiving date of August 8, 1977, shows that Clyde A. Zimmerman was made the Executive Vice-President in addition to Treasurer and a Director of Yankee Brokerage, Inc. on January 1, 1977. (Ex. A-5)

5. The Minutes of Annual Meeting of the Board of Directors of Yankee Brokerage, Inc., dated March 7, 1978, reflects the election of Clyde Anthony Zimmerman as Vice-President and Treasurer. (Ex. A-12)

6. The License Renewal Application, bearing a renewal date of July 6, 1981, shows that Petitioner was no longer an officer or director of Yankee Brokerage, Inc., effective July 1, 1981. (Ex. A-9)

7. A Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated March 13, 1979, was signed by Clyde A. Zimmerman. The action of the officers of the corporation in their official capacity were approved and officers for the ensuing year were elected, including Petitioner. The salary of Roy F. Zimmerman was approved at $80,000 a year. (Ex. A-14)

8. The Minutes of a Special Meeting of the Board of Directors Yankee Brokerage, Inc. indicates that Petitioner participated in the January 18, 1980, meeting as a director at which a resolution was adopted to take out $250,000 in insurance on Petitioner. A Call and Waiver of Notice, signed by Petitioner as a director, waived notice of the meeting, accepted the minutes, and authorized and approved the corporation's acts as recorded. (Ex. A-15)

9. A Waiver of Notice of Annual Meeting of Shareholders and Shareholders Consent to Action Without Formal Meeting, dated March 11, 1980, contains a resolution which called for the election of Petitioner as a director of the corporation for the ensuing year. (Ex. A-16)

10. A Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated March 11, 1980, adopted a resolution which called for the election of Clyde Anthony Zimmerman as Vice-President and Treas-

urer of the corporation for the ensuing year. Petitioner signed the document. (Ex. A-17)

11. A Waiver of Notice of Special Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated August 11, 1980, contained an adopted resolution that authorized action to have all salaried officers covered by workmen's compensation insurance. Petitioner signed the document. (Ex. A-18)

12. Clyde Anthony Zimmerman resigned as Vice-President, Treasurer, and as a Director of Yankee Brokerage, Inc. effective June 11, 1981. (Ex. A-19)

13. The Minutes of Special Meeting of Shareholders of Yankee Brokerage, Inc., dated October 13, 1981, records the resignation of Petitioner as Vice-President, Treasurer, and a member of the Board of Directors of the firm. Clyde Anthony Zimmerman was appointed to the position of special consultant to ". . . assist the officers of the corporation in attempting to clarify the financial situation of the business and to maintain its solvency." (Ex. A-20)

14. The Minutes of Special Meeting of the Board of Directors of Yankee Brokerage, Inc., dated October 13, 1981, reflects an action to enter into a contract with Petitioner who would be retained as a special consultant to assist the officers in reorganization, reconstruction, and day-to-day operation of the firm. (Ex. A-21)

15. On November 6, 1981, letters were sent to the creditors of Yankee Brokerage, Inc. seeking their assistance in trying to resolve the firm's financial difficulties. The letters were signed by Petitioner. A second series of letters, dated December 22, 1981, and signed by Petitioner, were also sent to the creditors seeking acceptance of a proposal to permit the firm's continuation in business. (A-22)

16. An administrative complaint was filed by the Agency on October 8, 1982, in which it was alleged that the firm had failed to make full payment promptly for 363 lots of perishable agricultural commodities from 61 sellers in the total amount of $975,833.21 during the period of May 1981 through November 1981.

17. The license of Yankee Brokerage, Inc. was revoked by Administrative Order in PACA Docket No. 2-6130 effective February 9, 1983.

18. Mr. J.J. Gardner, Chief, Regulatory Branch, Fruit and Vegetable Division, notified Mr. Clyde A. Zimmerman, by certified letter dated October 19, 1982, that a disciplinary complaint had been filed against Yankee Brokerage, Inc. and that as an officer, or director, or owner of more than ten percent of the corporation's stock, he was deemed to be responsibly connected. (Ex. A-23)

19. Petitioner, through his attorney, William S. Shull, submitted an answer received by the Agency on November 23, 1982, in which he denied being a "responsible person" with Yankee Brokerage, Inc. (Ex. A-24)

20. Mr. J.J. Gardner, by letter dated December 22, 1982, to Petitioner's attorney, held that Petitioner was responsibly connected with Yankee Brokerage, Inc. (Ex. A-25)

21. Petitioner, through his attorney, filed a petition for review of that determination, dated January 25, 1983, requested an oral hearing.

22. An oral hearing was held in Kansas City, Missouri, on August 25, 1983, to provide Petitioner an opportunity to present evidence to refute or rebut the determination by Mr. Gardner of "responsible connection".

CONCLUSIONS

The Perishable Agricultural Commodites Act, 1930, as amended, defines the term "responsibly connected" to mean affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association.

The issue in this proceeding is whether Clyde A. Zimmerman was "responsibly connected" with Yankee Brokerage, Inc. during the period of May through October 1981.

Petitioner testified that he started working for Yankee Brokerage, Inc. (Yankee), "Somewhere around 1972-73." (Tr. 5) His initial position with the firm was that of a salesman with duties to call shippers, primarily in the State of Washington, to get prices, then call Yankee customers in the Kansas City area and broker the product and then to write up the loads. (Tr. 6) He testified that he became an officer in the firm in 1974 when ". . . another gentleman . . . retired and was an officer . . ., I was told I was going to take his place as an officer." Petitioner became the Treasurer and a Director of Yankee (Tr. 6) In 1977 when another person left the firm, he was then made Executive Vice-President of Yankee. (Tr. 7)

Petitioner testified that even though he held those positions of Executive Vice-President, Treasurer, and Director of Yankee, the duties and responsibilities did not change. He continued as a salesman. He stated that his father, Roy F. Zimmerman, told him that he would be appointed to those positions; that he had not asked for the positions, nor did he receive additional compensation.

Roy F. Zimmerman owned 92 percent of the Yankee stock and he was described by Petitioner as ". . . very strong willed . . . and ruled with an iron hand . . . we were told you will do something this way and you did it. There was no argument about it, you either did it or

you could leave . . ." Most of the family was employed by Yankee or the truck line, also owned by Roy F. Zimmerman, in 1981.

The record contains copies of reports of Annual Meetings of the Board of Directors of Yankee. The Minutes of the meeting of the Board of Directors held on March 7, 1978, contains resolutions that were adopted which provided for establishing bank accounts and the fixing of Roy F. Zimmerman's salary at $5,000 per month. The meeting of March 13, 1979, ratified the actions of the officers during the preceding year and fixed Roy F. Zimmerman's salary at $80,000 per year. A special meeting of the Board of Directors, held on January 18, 1980, provided for a life insurance program for firm members including Petitioner who was to be insured for $250,000. A second meeting in 1980, held August 11, was for the purpose of authorizing action to provide for workmen's compensation insurance for each officer. Each of the reports of Minutes of Meeting, including those additional reports that ratified the officers' actions for the preceding year, was signed by Petitioner.

Petitioner produced several witnesses who testified about the control exerted by Roy F. Zimmerman over the business activities of Yankee. John Chick, an attorney, was formerly employed by the Joseph Y. DeCuyper law firm that represented Yankee and Mr. DeCuyper was Secretary and a Director of the Yankee firm. Mr. Chick worked for the law firm for some eight years beginning in 1972. He testified that the law firm prepared Yankee's corporate minutes by a mechanical system and that, to the best of his knowledge, no director or shareholder meetings were ever held. (Tr. 49-50) However, on cross examination, he could not state with any certainty that the meetings were not held. (Tr. 57-58) When asked about Roy F. Zimmerman's relationship with his children, he testified that he would ". . . make all kinds of crazy deals, that these kids had to live with and try to work their

way out of." (Tr. 59) He stated that Roy F. Zimmerman's children acted as salesmen, "They would call and do the buying and selling, or whatever was brokered, the fruits and vegetable." (Tr. 61) He stated ". . . Roy Zimmerman, ran that company with a very iron hand and not covered with any kind of velvet glove. It was very much a dominating situation because of not only him physically, but him as a personality." (Tr. 61)

Steven Crain, also an attorney who was employed by the DeCuyper law firm from 1970 to 1976, gave testimony very similar to that of Mr. Chick. He testified that Roy Zimmerman controlled the company and stated that "Roy was almost like a biblical patriarch. He might have handed out the titles to his children and he was glad to have them in the business . . . but there was never a moment that I was around Zimmerman where he wasn't telling everyone . . . that he was the total business". (Tr. 75-76)

Richard Zimmerman, a brother of Petitioner, testified that he had worked for Yankee, first as a part-time employee, and then as a full-time employee beginning in 1975. He was employed as a salesman and was advised that he had become a member of the Board of Directors of Yankee. (RTr. 6)[1] He stated that ". . . in matters of business, Roy just told me what to do and I would you know, I did them." (RTr. 7) He stated that as a Director of Yankee, he was never called upon to make any type of management decision. (RTr. 7) He said that even if he had known of his responsibilities as a Director of the corporation, he would still have accepted that position. (RTr. 12) He resigned as a Director in October 1981 when he became aware of ". . . what kind of light" in which the Director's position placed him.

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[1] It was agreed prior to the hearing, by each party's attorney, that the testimony of each witness would be incorporated in each proceeding, PACA RC-1030 and PACA RC-1031. The transcript references: PACA RC 82-1031 will be designated as RTr.

Petitioner produced two other witnesses, David B. Zimmerman, another brother who was also employed by Yankee, and Robert C. Reinholt, a partner in a produce firm that did business with Yankee. Both testified as to the strong hand of Roy Zimmerman in controlling Yankee.

Petitioner contends that Yankee was nothing more than the alter ego of Roy Zimmerman and that Petitioner served only as a nominal officer with no power in management and operation of the firm. Petitioner has advanced considerable argument in support of piercing the corporate veil to show that Yankee was nothing more than the one man corporation of Roy Zimmerman.

The courts have held ". . . it is the use to which the corporate form is put which controls and the facts in each particlular case will determine the course of relief", *Francis O. Day Co.* v. *Shapiro*, 267 F. 2d 669, 674. The general rule is that the corporate entity should be upheld unless specific, unusual circumstances call for looking beyond the corporate structure, *Anderson* v. *Abbott*, 321 U.S. 349, 362, *Paumier* v. *Barge Bt.*, 1793, 395 F. Supp. 1019.

Yankee was a Missouri corporation of long standing and it was a closely held family corporation that provided employment for Roy Zimmerman and most of his immediate family. He brought his sons into the firm as salesmen to represent the firm in dealing with sellers and buyers of produce. Petitioner became an employee of Yankee "Somewhere around 1972-73" (Tr. 5) as a salesman with duties of contacting customers in Washington State to obtain prices and then to contact customers in the Kansas City area to broker the product. In 1974, he was made Treasurer and a Director of the firm and in 1977, he was made the Executive Vice-President of Yankee. The official file contains copies of Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, Minutes of a Special Meeting of the Board of Directors

Yankee Brokerage, Inc., and Waiver of Notice of Special Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting. Each of the official corporate documents was signed by Petitioner in his capacity as a Director of Yankee. The director's actions reflected substantive actions on behalf of Yankee. Petitioner served as an officer and Director of Yankee for some seven years.

Petitioner's witness, Mr. Chick, testified as to the initiative demanded of Yankee's salesmen. When in describing Roy Zimmerman's relationship with his children, he stated that Roy ". . . would make all kinds of crazy deals, that these kids had to then live with and try to work their way out of . . ." (Tr. 59) Even Petitioner's witness recognized the latitude provided Yankee's salesmen in making business decisions on behalf of the firm.

In *Christian and Porter Aluminum Co.*, 584 F. 2d 326, 338 (9th Cir. 1978), the court stated "The party seeking to have the corporate entity disregarded has the burden of proving that the alter ego theory should be applied." After a review of all the evidence, it is concluded that Petitioner has not overcome that burden.

Petitioner was a representative of Yankee for some eight years. He was Treasurer and Director for at least seven years and made Executive Vice-President in 1977, all positions with substantial responsibility. In a closed family corporation, it is inconceivable that Petitioner was nothing more than a figurehead, as he would have us believe, particularly in light of the working conditions at Yankee as described by Richard Zimmerman. When asked how far Roy Zimmerman was physically from him when he was doing ". . . telephone sale work?", he answered, "He sat right in the middle. He had a circular desk with an opening in the middle and we all sat around Roy . . . He could reach over and touch me, maybe two feet." Under such working conditions, it is difficult

to envision Roy Zimmerman working in a total vacuum making all of the business and management decisions devoid of any input from the other corporate officers and directors.

In *Birkenfield* v. *U.S.*, 369 F. 2d 493, (3rd Cir. 1966), the court held Birkenfield responsibly connected. In that case, Birkenfield had been Treasurer, a member of the board of directors of the Ft. Pitt Tomato & Produce Co., Inc. and had owned more than ten percent of the company's outstanding shares of stock. The thrust of Birkenfield's contention before the Department, as well as in the District Court, was that he was only nominally such an official or shareholder, and that actual authority was vested in others. The court stated:

> Surely, the relationships of director, officer, or substantial shareholder form a sufficient nexus for the arbitrary conclusion of responsible connection . . . The fact that an individual has not exercised "real" authority in the sanctioned company is not controlling . . .

In *Quinn* v. *Butz*, 510 F. 2d, 743 at 756, the court stated in commenting on the Birkenfield decision that:

> We do not consider our construction of 1(9) inconsistent with either of the two decisions upon which appellees endeavor to support the position that a conclusive presumption is provided . . . In *Birkenfield* v. *United States* . . . where one who admittedly had been a treasurer, director and a 10%-plus stockholder of an offending corporate licensee asserted that "he never had real responsibility in the corporation's affairs." The court held merely that "(T)he automatic exclusion of 'responsibly connected' persons is not irrational or arbitrary under the circumstances".

Petitioner was content to remain an officer and director of Yankee for more than seven years. It was only after the firm encountered financial problems that he chose to

resign from those positions. He remained with the firm as a salesman because if he had left ". . . I would have left a big hole in their sales, at that point. I was selling 50 loads of produce a month . . ." (Tr. 15)

In *Quinn* v. *Butz*, 510 F. 2d 743 at 760, the court established the principle that a Petitioner should be afforded the opportunity to rebut the Agency determination of responsible connection. Petitioner was afforded that opportunity. I do not believe Petitioner has sustained that burden in this proceeding. Under the circumstances, Petitioner must be held "responsibly connected" with Yankee.

DECISION

Petitioner, Clyde A. Zimmerman, was responsibly connected under the Perishable Agricultural Commodities Act with Yankee Brokerage, Inc. during the period of May and June 1981.

Done at Washington, D.C., this 1st day of March 1984.

/s/ Harry L. Williams
HARRY L. WILLIAMS
Presiding Officer

SA-13

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

DECISION

PACA RC 82-1031

IN RE: RICHARD S. ZIMMERMAN,
Petitioner

PRELIMINARY STATEMENT

This is a proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) and the applicable Rules of Practice (7 C.F.R.), Section 47.1; 47.2(a) through (h); 47.46; and 47.47 *et seq.*, which pertain to the administrative determination of whether a person is or was "responsibly connected" with a licensee under the Act. This proceeding is held to determine if the Petitioner was "responsibly connected" with Yankee Brokerage, Inc., a Missouri corporation, and a licensee under the Act at the time Yankee Brokerage, Inc. purchased 363 lots of perishable agricultural commodities from 61 sellers, in interstate commerce, and failed to make full payment promptly of the agreed purchase prices.

A disciplinary proceeding was instituted under the Perishable Agricultural Commodities Act by a complaint filed on October 8, 1982, against Yankee Brokerage, Inc. in PACA Docket No. 2-6130. It was alleged that Yankee Brokerage, Inc., during the period of May 1981 through November 1981, purchased 363 lots of perishable agricultural commodities from 61 sellers in interstate commerce

and failed to make full payment promptly of the agreed purchase prices in the total amount of $975,833.21. On December 30, 1982, Administrative Law Judge William J. Weber issued a decision order, effective February 9, 1983, finding that respondent had committed willful, flagrant, and repeated violations of Section 2 of the Act.

A hearing was held in PACA RC 82-1031, on August 25, 1983, in Kansas City, Missouri, to determine whether Richard S. Zimmerman was an individual "responsibly connected" with Yankee Brokerage, Inc. during the period of May 1981 through November 1981. Richard S. Zimmerman was represented by Mr. William E. Shull, Kearney, Missouri. Mr. Edward M. Silverstein, Office of the General Counsel, represented the Agency. The hearing was held before Harry L. Williams who had been designated the Presiding Officer. The Petitioner and the Agency elected to file briefs.

FINDINGS OF FACT

1. Yankee Brokerage, Inc., a Missouri corporation, had as its business address Post Office Box 12458, North Kansas City, Missouri.

2. Petitioner became a salesman for Yankee Brokerage, Inc. in 1975. As a salesman, he would contact suppliers of produce for the purpose of brokering that produce to firms in the Kansas City, Missouri area.

3. The PACA License Reneawl Application bearing a receiving date of August 8, 1977, shows that Richard Zimmerman was made a Director of Yankee Brokerage, Inc. on January 1, 1977. (Ex. A-3)

4. The License Renewal Application, bearing a renewal date of July 6, 1981, shows that Petitioner was no longer a Director of Yankee Brokerage, Inc., effective August 1, 1981 (Ex. A-7)

5. The Minutes of Annual Meeting of the Board of Directors of Yankee Brokerage, Inc., dated March 7,

1978, shows that Petitioner was ". . . present and accepted the office" of Director and participated in the business meeting that included the election of officers, establishing a bank account, establishing a savings account, and fixing the salary of Roy Zimmerman at $5,000 per month. (Ex. A-10)

6. The Waiver of Notice of Annual Meeting of Shareholders and Shareholders Consent to Corporate Action Without Formal Meeting, dated March 13, 1979, shows that Petitioner was elected as a Director of the corporation. (Ex. A-11)

7. A Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated March 13, 1979, was signed by Petitioner. The Board of Directors ratified the action of the firm's officers during the prior year, elected a slate of officers, and set the salary of Roy Zimmerman at $80,000 per year. (Ex. A-12)

8. The Minutes of a Special Meeting of the Board of Directors Yankee Brokerage, Inc. dated January 18, 1980, indicated Petitioner's participation as a Director at which a resolution was adopted to take out $150,000 in insurance on Petitioner. A Call and Waiver of Notice, signed by Petitioner as a director, waived notice of the meeting, accepted the minutes, and authorized, ratified, and approved the corporation's acts as recorded. (Ex. A-13)

9. The Waiver of Notice of Annual Meeting of Shareholders and Shareholders Consent to Action Without Formal Meeting, dated March 11, 1980, shows that Petitioner was elected as a Director of Yankee Brokerage, Inc. by the corporation's shareholders. (Ex. A-14)

10. A Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated March 11, 1980, signed by

Petitioner, shows that the Board of Directors ratified the actions of the officers for the previous year and elected officers for the following year. (Ex. A-15)

11. A Waiver of Notice of Special Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated August 11, 1980, contains a resolution that was adopted authorizing action to have all salaried officers covered by workmen's compensation. Petitioner signed the document as a Director. (Ex. A-16)

12. The Minutes of Special Meeting of Shareholders of Yankee Brokerage, Inc., dated October 13, 1981, records the resignation of Petitioner as a member of the Board of Directors, to be effective immediately. (Ex. A-17)

13. An administrative complaint was filed by the Agency on October 8, 1982, in which it was alleged that the firm had failed to make full payment promptly for 363 lots of perishable agricultural commodities from 61 sellers in the total amount of $975,833.21 during the period of May 1981 through November 1981.

14. The license of Yankee Brokerage, Inc. was revoked by Administrative Order in PACA Docket No. 2-6130 effective February 9, 1983.

15. Mr. J.J. Gardner, Chief, Regulatory Branch, Fruit and Vegetable Division, notified Mr. Richard S. Zimmerman by certified letter dated October 19, 1982, that a disciplinary complaint had been filed against Yankee Brokerage, Inc. and that as an officer, director, or owner of more than ten percent of the corporation's stock, he was deemed to be responsibly connected. (Ex. A-19)

16. Petitioner, through his attorney, William S. Shull, submitted an answer received by the Agency on No-

vember 23, 1982, in which he denied being "responsibly connected" with Yankee Brokerage, Inc. (Ex. A-20)

17. Mr. J.J. Gardner, by letter dated December 22, 1982, to Petitioner's attorney, held that Petitioner was responsibly connected with Yankee Brokerage, Inc. (Ex. A-21)

18. Petitioner, through his attorney, filed a petition for review of that determination, dated January 25, 1983, and requested an oral hearing. (Ex. A-23)

19. An oral hearing was held in Kansas City, Missouri, on August 25, 1983, to provide Petitioner an opportunity to present evidence to refute or rebut the determination by Mr. Gardner of "responsible connection".

CONCLUSIONS

The Perishable Agricultural Commodities Act, 1930, as amended, defines the term "responsibly connected" to mean affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association.

The issue in this proceeding is whether Richard S. Zimmerman was "responsibly connected" with Yankee Brokerage, Inc. during the period of May through October 1981.

Petitioner testified that he started working for Yankee Brokerage, Inc. (Yankee) in 1975 as a salesman and to perform clerical duties. (RTr. 5-6-9)[1] He described his

[1] It was agreed prior to the hearing, by each party's attorney, that the testimony of each witness would be incorporated in each proceeding PACA RC-1030 and PACA RC-1031. The transcript references in PACA RC-1031 will be designated as RTr.

duties as "I'd call shippers and get prices, determine what kind of freight it would take to deliver the merchandise. I'd call and quote it to my customers to sell them. I'd make sure the merchandise got loaded, delivered". (RTr. 14)

Petitioner was unsure as to the exact date when he was appointed to the Board of Directors of Yankee. He stated that, "He (Roy Zimmerman) just told me." (RTr. 6) He testified that his duties did not change, did not attend any Board of Directors meeting, received no additional compensation, and was not asked to make any kind of management decision. (RTr. 6-7) He resigned the position as a director in October 1981 when after Roy Zimmerman left, ". . . I came to understand the position that we were in, the light that it would put me in, I didn't have any other choice but to resign, because I had no control of the situation". (RTr. 8)

Petitioner admitted signing a number of documents as a Director of Yankee. The documents included Minutes of Annual Meetings of the Board of Directors of Yankee, Waiver of Notice of Annual Meetings of Directors and consent to corporate action without formal meetings and waiver of notice of special meeting of directors to corporate action without formal meeting. The board actions were for the purpose of fixing Roy Zimmerman's salary, providing for life insurance for Petitioner in the amount of $150,000, ratifying the actions of the officers during preceding years and to provide for workmen's compensation for each officer. Petitioner testified that he signed the documents because he was instructed to by his father, Roy Zimmerman, and Joe DeCuyper, the firm's attorney and a firm officer.

Petitioner produced several witnesses who testified about the control exerted by Roy Zimmerman over the business activities of Yankee. John Chick, former employee of the DeCuyper law firm, testified that the law

firm prepared Yankee's corporate minutes by a mechanical system and that to the best of his knowledge no director or shareholder meetings were ever held. (Tr. 49-50) However, on cross examination, he could not state with any certainty that meetings were not held. (Tr. 57-58) When asked about Roy Zimmerman's relationship with his children, he testified that he would ". . . make all kinds of crazy deals, that these kids had to live with and try to work their way out of." (Tr. 59) He stated, ". . . Roy Zimmerman, ran the company with a very iron hand and not covered with any kind of velvet glove. It was very much a dominating situation because of not only him physically, but him as a personality." (Tr. 61)

Steven Crain, also an attorney formerly employed by the DeCuyper firm from 1970 to 1976, gave testimony very similar to that of Mr. Chick.

The testimony of Clyde Zimmerman, Petitioner in PACA RC 82-1030, was incorporated by reference in this proceeding. Mr. Zimmerman, also a son of Roy and a Yankee salesman, testified as to the heavy handed control exerted by his father over the produce firm.

Petitioner produced two other witnesses, David B. Zimmerman, who was also employed by Yankee, and Robert C. Reinholt, a partner in a produce firm that did business with Yankee. Both testified as to the strong hand of Roy Zimmerman in controlling Yankee.

Petitioner contends that Yankee was nothing more than the alter ego of his father, Roy Zimmerman, and that Petitioner served as a Director of Yankee because Roy handed out titles and was happy to have him in the business. Petitioner contends that he was a nominal director with no power in management and operation of the firm. Petitioner has advanced considerable argument in support of piercing the corporate veil to show that Yankee was nothing more than the one-man corporation of Roy Zimmerman.

The courts have held ". . . it is the use to which the corporate form is put which controls and the facts in each particular case will determine the course of relief", *Francis O. Day Co.* v. *Shapiro*, 267 F. 2d 669, 674. "The general rule is that the corporate entity should be upheld unless specific, unusual circumstances call for looking beyond the corporate structure", *Anderson* v. *Abbott*, 321 U.S. 349, 362, *Paumier* v. *Barge Bt.* 1793, 395 F. Supp. 1019.

In *Christian and Porter Aluminum Co.*, 584 F. 2d 326, 338 (9th Cir. 1978), the court stated, "The party seeking to have the corporate entity disregarded has the burden of proving that the alter ego theory should be applied." After reviewing all the evidence, it is concluded that Petitioner has not overcome that burden.

Yankee was a Missouri corporation of long standing and it was a closely held family corporation that provided employment for Roy Zimmerman and a number of his immediate family. He brought his sons into the firm as salesmen to represent the firm in dealing with sellers and buyers of produce. Petitioner became an employee in 1975 and was elected to the Board of Directors January 1, 1977. The official file contains copies of Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, Minutes of a Special Meeting of the Board of Directors Yankee Brokerage, Inc., and Waiver of Notice of Special Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting. Each of the official corporate documents was signed by Petitioner in his capacity as a Director of Yankee. Each of the Director's actions were substantive business decisions on behalf of Yankee. Petitioner served as a Director of Yankee until October 1981 because as he stated, ". . . I came to the understanding of what the situation was, I saw exactly that set me, in what kind of light." (RTr. 11)

In *Birkenfield* v. *U.S.*, 369 F. 2d 493, (3rd Cir. 1966), the court held Birkenfield responsibly connected. In that case, Birkenfield had been Treasurer, a member of the board of directors of the Ft. Pitt Tomato & Produce Co., Inc. and had owned more than ten percent of the company's outstanding shares of stock. The thrust of Birkenfield's contention before the Department, as well as in the district court, was that he was only nominally such an official or shareholder, and that actual authority was vested in others. The court stated:

> Surely, the relationships of director, officer, or substantial shareholder form a sufficient nexus for the arbitrary conclusion of responsible connection . . . The fact that an individual has not exercised "real" authority in the sanctioned company is not controlling . . .

In *Quinn* v. *Butz*, 510 F. 2d, 743 at 756, the court stated in commenting on the Birkenfield decision that:

> We do not consider our construction of 1(9) inconsistent with either of the two decisions upon which appellees endeavor to support the position that a conclusive presumption is provided . . . In *Birkenfield* v. *United States* . . . where one who admittedly had been a treasurer, director and a 10%-plus stockholder of an offending corporate licensee asserted that "he never had real responsibility in the corporation's affairs". The court held merely that "(T)he automatic exclusion of 'responsibly connected' persons is not irrational or arbitrary under the circumstances."

Petitioner was content to remain a director of Yankee for more than four years. It was only after he learned of the implications of that relationship that he resigned.

In *Quinn* v. *Butz*, 510 F. 2d 743 at 760, the court established the principle that a Petitioner should be afforded the opportunity to rebut the Agency determination of responsible connection, but clearly placed the burden

of proof on the Petitioner. It is my conclusion that Petitioner has failed to sustain that burden. Under the circumstances, Petitioner must be held "responsibly connected" with Yankee Brokerage, Inc.

DECISION

Petitioner, Richard Zimmerman, was responsibly connected under the Perishable Agricultural Commodities Act with Yankee Brokerage, Inc. during the period of May through October 1981.

Done at Washington, D.C., this 1st day of March 1984.

/s/ Harry L. Williams
HARRY L. WILLIAMS
Presiding Officer

SA-23

AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

PACA RC 82-1030

IN RE: CLYDE A. ZIMMERMAN,
Petitioner

FINAL ORDER

On April 24, 1984, the petitioner filed a petition for review of the Presiding Officer's decision in the above captioned proceeding. The Petition for review has been considered in conjunction with the Presiding Officer's decision.

It is hereby ordered that the Presiding Officer's decision is affirmed.

Done at Washington, D.C.
this 23 day of October 1984

/s/ William T. Manley
W. T. MANLEY
Acting Administrator

SA-24

AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

PACA RC 82-1031

IN RE: RICHARD ZIMMERMAN,
Petitioner

FINAL ORDER

On April 24, 1984, the petitioner filed a petition for review of the Presiding Officer's decision in the above captioned proceeding. The Petition for review has been considered in conjunction with the Presiding Officer's decision.

It is hereby ordered that the Presiding Officer's decision is affirmed.

Done at Washington, D.C.
this 17th day of September 1984

/s/ William T. Manley
WILLIAM T. MANLEY
Acting Administrator

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2433

CLYDE A. ZIMMERMAN, *et al.*,
Petitioners,

vs.

WILLIAM T. MANLEY, ETC., *et al.*,
Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE

Petitioners' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 26, 1985